Supreme Court, U.S.
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No. 06-815

IN THE

Supreme Court of the United States

JAY REIFERT,

Petitioner,

v.

SOUTH CENTRAL WISCONSIN MLS CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a rule of respondent South Central Wisconsin MLS Corp. requiring membership in an association of Realtors® as a condition of participation in the MLS was not an unlawful tying arrangement under Section 1 of the Sherman Act, where there was no evidence of any competitors in the alleged "tied" market for general real estate association services and where petitioner was free to join any of several competing associations of Realtors®.

2. Whether the Court of Appeals correctly held that a rule of non-party National Association of Realtors® preventing MLS participants from soliciting sellers of properties listed on the MLS during the term of the exclusive listing did not violate Section 1 of the Sherman Act, where petitioner offered no evidence of anticompetitive effects, the rule is necessary to induce brokers to place their listings on the MLS, and the rule does not prevent MLS participants from soliciting the seller for other properties or from soliciting the listing property after expiration of the exclusivity period.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent South Central Wisconsin MLS Corp. is a wholly-owned subsidiary of respondent Realtors® Association of South Central Wisconsin ("RASCW"). RASCW has no parent corporation, and there is no publicly held company that owns 10% or more of RASCW.

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STATUTE

15 U.S.C. § 1 1

RULE

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NAR, *Code of Ethics and Standards of Practice* (Jan. 1, 2007), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2007Code 20, 21, 22

STATEMENT OF THE CASE

Respondent Realtors® Association of South Central Wisconsin, Inc. ("RASCW") is an association of real estate professionals in south central Wisconsin. It is affiliated with the Wisconsin Realtors® Association ("WRA") and the National Association of Realtors® ("NAR"). In order to join RASCW, one must also join the WRA and NAR. Membership in RASCW is generally open to any licensed real estate professional who agrees to abide by the NAR Code of Ethics and pays the applicable fees.

RASCW's membership benefits include the opportunity to participate in a multiple listing service ("MLS") operated by RASCW's wholly owned subsidiary, respondent South Central Wisconsin MLS Corp. ("SCWMLS"). SCWMLS also permits members of other associations of Realtors® to participate in the MLS. It does not, however, offer MLS participation to real estate licensees who choose not to join an association of Realtors®.

Petitioner Jay Reifert is a residential real estate broker in Wisconsin. Petitioner has been a member of both RASCW and SCWMLS for almost 20 years. Neither RASCW nor SCWMLS has ever tried to bar him from membership.

Petitioner filed this lawsuit because he wishes to participate in SCWMLS but does not want to be a member of RASCW or any other association of Realtors®. He alleged that the SCWMLS rule limiting participation in the MLS to members of a Realtor® association ("Membership Rule") constitutes an unlawful tying arrangement in violation of Section 1 the Sherman Act, 15 U.S.C. § 1. Specifically, petitioner alleged that the Membership Rule effectively tied Realtor® association membership (the "tied" product) to MLS participation (the "tying" product) and resulted in harm to competition in the tied product market – that is, the market in which Realtor® associations compete. Petitioner also alleged

that the Membership Rule constituted an unlawful group boycott.

The parties filed cross motions for summary judgment. The United States District Court for the Western District of Wisconsin granted respondents' motion for summary judgment and denied petitioner's motion.

The Seventh Circuit affirmed the district court's ruling in all respects. First, regarding petitioner's tying claim, the Seventh Circuit explained that a necessary element of illegal tying is foreclosure of competition in the tied product market and that such foreclosure cannot exist unless there is at least one other competitor in the tied product market. (Pet. App. 9a). The Seventh Circuit then examined each of the following associations proposed by petitioner as competitors to RASCW, NAR, and other Realtor® associations:

Appraisal Institute
Asian Real Estate Agent Association
Chinese American Real Estate Professionals Association
Chinese Real Estate Association of America
Colorado Association of Exclusive Buyer Agents
Massachusetts Association of Buyer Agents
National Association of Exclusive Buyer Agents
National Association of Independent Fee Appraisers
National Association of Hispanic Real Estate Professionals
National Association of Independent Real Estate Brokers
National Association of Real Estate Appraisers
National Association of Real Estate Brokers

Finding that these associations have specified purposes that set them apart from the more generalized associations of Realtors®, the Seventh Circuit concluded that petitioner had failed to adduce evidence from which a jury could find that any of these associations were in the same product market as RASCW or NAR. (*Id.* at 12a-14a).

Second, the Seventh Circuit affirmed summary judgment for respondents on petitioner's group boycott claim. (Pet. App. 16a). The court found that, for the same reasons that petitioner's tying claim failed, petitioner also failed to establish anticompetitive effects in any relevant market under his group boycott claim. (*Id.*).

Third, the Seventh Circuit addressed petitioner's new claim – which he had failed to plead in his complaint below – that Article 16 of the NAR Code of Ethics violates Section 1 of the Sherman Act. (Pet. App. 17a).[1] Article 16 prevents a Realtor® from contacting a seller who has a current exclusive listing agreement with another Realtor® for purposes of arranging to enter into a new listing agreement to begin when the exclusive agreement ends. The Seventh Circuit found that this requirement has procompetitive benefits because, without this assurance, brokers would be reluctant to share their listings through the MLS for fear that other agents would steal their clients. (*Id.* at 17a-18a). Thus, under the rule of reason, it was incumbent on petitioner to produce evidence of anticompetitive effects to outweigh these procompetitive effects. (*Id.* at 17a). Petitioner produced no such evidence, and summary judgment for respondents was therefore proper.

Petitioner's request for rehearing of the Seventh Circuit's decision was denied.

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[1] The district court did not address this theory of liability in awarding respondents summary judgment, presumably because it was not pleaded in petitioner's complaint.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT CORRECTLY APPLIED WELL-ESTABLISHED LAW IN FINDING THAT PETITIONER FAILED TO ADDUCE SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT.

Petitioner does not dispute the fundamental proposition of tying law which underlies the Seventh Circuit's decision – namely, that in order to demonstrate the requisite foreclosure of competition in the tied product market, a plaintiff must identify at least one other competitor in that market. (*See* Pet. App. 9a-10a). This is because, where there is no competitor, there is no competition to be foreclosed. Instead, petitioner merely disagrees with the court's finding that he failed to adduce any evidence of such a competitor. The Supreme Court should not review this essentially factual issue – particularly where the Seventh Circuit did nothing more than apply well-established law to the evidence presented.

A. The Seventh Circuit's "Economic Evidence" Requirement Does Not Conflict With Precedent And Was Properly Applied.

Petitioner first takes issue with the Seventh Circuit's requirement that he present "economic evidence" in order to demonstrate which entities fall within the tied product market. (Pet. 8-9). The Seventh Circuit explained:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 ... (1962).
>
> This Court requires that a plaintiff prove that products are good substitutes using economic evidence; a conclusory assumption of competition where products or services appear to be similar is insufficient. *See*

> *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004). Actual data and a reasonable analysis are necessary to demonstrate that a product or service is a good substitute for another. "Economics, like other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." *Id.* [2]

(Pet. App. 10a-11a). Contrary to petitioner's unsupported assertions (*see* Pet. 7, 9, 12), the Seventh Circuit did not hold that such economic evidence must always be presented by an economist's expert testimony. Rather, it relied on the unremarkable proposition that the boundaries of a relevant product market are to be determined by use of economic evidence and analysis – not by mere conclusory assertions.

Petitioner argues that the Seventh Circuit's economic evidence requirement conflicts with the Supreme Court's decision in *Brown Shoe* – a 1962 decision in which the Supreme Court identified certain "practical indicia" which may be used in determining the relevant product market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). However, the Seventh Circuit correctly explained that, "[w]hile the 'practical indicia' named in *Brown Shoe* ... are important considerations in defining a market, they were never intended to exclude economic analysis altogether." (Pet. App. 14a). The Seventh Circuit further noted that *Brown Shoe* itself:

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[2] Petitioner reads this quotation as acknowledging that his evidence "tended to prove that the trade association service products of the thirteen firms 'seem to be substitutes' and the Seventh Circuit's ruling was 'counterintuitive.'" (Pet. 23 n.9). This is nonsense. The Seventh Circuit was merely citing another decision's explanation as to why economic analysis is necessary. Indeed, the Seventh Circuit later found that, "[e]ven without an economic analysis, it is apparent that RASCW lacks competition." (Pet. App. 12a).

> recognized the importance of economic analysis, including cross-price elasticity of demand. *See Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.")."

(*Id.*).

Petitioner next argues that the Seventh Circuit's economic evidence requirement conflicts with decisions from the Sixth, Ninth, and Eleventh Circuits. (Pet. 9-11). This is not so.[3]

First, in *Foundation for Interior Design Education Research v. Savannah Collage of Art & Design*, the district court granted the plaintiff's motion to dismiss the defendant's antitrust counterclaim, and the Sixth Circuit affirmed. 244 F.3d 521 (6th Cir. 2001). Explaining that "[d]ismissal is appropriate if the definition of the relevant market ... is 'implausible' or 'not tenable,'" the district court rejected the defendant's proposed market definition because defendant's counsel had admitted at oral argument that defendant in fact competed in a broader market. *Foundation for Interior Design Education Research v. Savannah Collage of Art & Design*, 73 F. Supp. 2d 829, 837, 838 (W.D. Mich. 1999). These decisions have nothing to do with the type or quantum of evidence required to define a market on summary judgment.

Far from conflicting with a decision of the Sixth Circuit, the decision below squarely accords with an essentially identical ruling of that Court. Specifically, in *Buyer's Corner Realty, Inc. v. Northern Ky. Ass'n of Realtors, Inc.*, 198 Fed.

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[3] Petitioner also claims the circuits are "requesting guidance" on market definition principles, but he identifies no such requests. (Pet. 23). Rather, petitioner only cites statements by courts that market definition may be counterintuitive or confusing. (*Id.*).

App'x 485 (6th Cir. 2006) (per curiam), *petition for cert. filed*, No. 06-936 (U.S. Jan. 3, 2007), the Sixth Circuit summarily affirmed a decision of a Kentucky district court that addressed a membership rule identical to the rule at issue in this case – and that upheld the rule on grounds essentially identical to those offered by the Seventh Circuit. In light of the Sixth Circuit's affirmance in *Buyer's Corner*, it simply cannot be argued that there is a conflict between the Sixth and Seventh Circuits.[4]

Second, in *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991), the court stated that the plaintiff real estate association "competes in the market for professional affiliation with the Realtors." However, the Eleventh Circuit did not even discuss the market definition issue or how it came to this conclusion, and there is no indication that the appropriate market definition was even disputed by the parties. The Eleventh Circuit's omission of any economic evidence analysis on this issue is hardly a holding that such evidence is not required where the market definition is disputed. *See Estate of Magnin v. Commissioner*, 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without discussion, the case does not bind future panels."); *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) ("A point of law merely assumed in an opinion, not discussed, is not authoritative.").[5]

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[4] In another recent unsuccessful lawsuit attacking an identical MLS membership rule, the District Court for the Eastern District of Washington likewise found on summary judgment that the plaintiffs failed to identify any competitors to Realtor® associations. *See Prencipe v. Spokane Bd. of Realtors*, No. CIV-04-0319-LRS, 2006 WL 1310402, at *2 & n.4 (E.D. Wash. May 16, 2006).

[5] Indeed, the distinction between *Thompson* and this case is essentially one of fact. The Eleventh Circuit's ultimate finding – that competition had been foreclosed in the tied product market – was based on evidence that, "as a result of the tie and the prohibitive cost of joining two groups, 400 brokers either did not join or quit" the plaintiff board. (Pet. App. 15a

Finally, in *Lucas Automotive Engineering, Inc. v. Bridgestone/ Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001), the plaintiff survived summary judgment because it produced economic evidence of lack of price sensitivity between products. In other words, the Ninth Circuit applied the same legal principle as did the Seventh Circuit. The facts, however, were entirely different.

Not only are petitioner's cited decisions not in conflict with the Seventh Circuit, but each of these other Circuits has held in other decisions that some sort of economic evidence is required for a plaintiff to define properly the relevant market. *See Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004) (rejecting market definition that was not based on a cross-price elasticity analysis), *cert. denied*, 126 S. Ct. 334 (2005); *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998) (per curiam) ("We have stated that '[c]onstruction of the relevant economic market or a showing of monopoly power in that market cannot be ... based upon lay opinion testimony.'") (alteration and omission in original); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996) (affirming summary judgment for defendants and rejecting

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(*citing Thompson*, 934 F.2d at 1578)). By contrast, petitioner did not, and could not, offer such evidence here. Indeed, he did not point to a single individual – not even petitioner himself – who declined to join another association because he or she was required to join RASCW, WRA, and NAR. Instead, petitioner tried to introduce evidence that certain professionals simply do not wish to join RASCW. (Pet. 23). But even putting aside the substantial statistical inadequacies of petitioner's evidence in this regard, it is well established that merely being forced to purchase an unwanted product does not create foreclosure in the tied product market. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) ("when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed"), *abrogated on other grounds, Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

expert's "'anecdotal'" market definition). The Circuits are thus in accord that economic evidence is required in order to demonstrate the relevant product market in an antitrust lawsuit.

In addition to arguing that he need not introduce any economic evidence at all, petitioner also contends that he did introduce economic evidence which was incorrectly rejected by the Seventh Circuit because it was not presented through expert testimony. (Pet. 7, 12). However, the absence of expert testimony is *not* the reason that the Seventh Circuit rejected the evidence introduced by petitioner. Rather, the Seventh Circuit rejected plaintiff's purported economic evidence as both unsound and irrelevant.

As described in his brief, petitioner tried to compare real estate association membership rates in so-called "open MLS" areas with rates in "closed MLS" areas (that is, areas where the MLS allows non-Realtors® to join, and areas where it does not). (Pet. 24-25). Petitioner claimed that this comparison demonstrated an increase in membership rates for the allegedly competing associations over Realtor® associations in "open MLS" areas. (*Id.*).

The Seventh Circuit rejected petitioner's comparison for two reasons. First, the Seventh Circuit observed that the comparison "does not account for other possible explanations for the observed differences." (Pet. App. 11a). In other words, in direct contravention of well-established statistical methods, petitioner's comparison did not control for other variables that might affect association membership from place to place. As the district court explained:

> It is likely that markets for professional real estate services are different in California, Georgia, Alaska and Massachusetts and Wisconsin. For example, the proffered competing organizations are directed at specific ethnic communities yet there is no apparent effort to control for the significant differences in

> populations between markets. Comparison of the data indicates great disparities in membership rates within the open and closed market which suggest that other factors, far more than open or closed status, impact membership rates.

(*Id.* at 34a). This failure to control for other variables, as well as petitioner's failure to test for whether the observed differences were statistically significant, rendered his comparison unreliable and inadmissible. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (affirming summary judgment for defendants where plaintiff failed to control for other, non-discriminatory factors that may have caused statistical differences); *Coates v. Johnson & Johnson*, 756 F.2d 524, 537 n.11 (7th Cir. 1985) (explaining the importance of testing for statistical significance).

Second, the Seventh Circuit found petitioner's comparison to be "unreliable ... because it fails to speak to the central question of whether a competitor exists in this particular 'closed' market." (Pet. App. 11a). Indeed, as the district court noted, petitioner's own expert witness "expressly testified at his deposition that the comparison of membership rates between open MLS and closed MLS markets does not demonstrate that the associations are in the same product market as defendant Realtors and that he has not done any analysis that would support such a conclusion." (*Id.* at 35a). While petitioner attempts to paint his comparison as a cross-price elasticity analysis (Pet. 24-25), that comparison simply does not examine – as a cross-price elasticity analysis must – whether changes in price for Realtor® association membership affect demand for the other allegedly competing associations. Thus, whatever probative value petitioner's comparison has, it simply does not speak to whether these associations are in the same product market.

In sum, the Seventh Circuit's requirement that the relevant market be delineated through economic evidence is consistent with the precedent both of this Court and of other Circuits.

Petitioner's real complaint is that the Seventh Circuit erred in finding his purported "economic evidence" to be unreliable and irrelevant to the market definition issue – a fact-based argument that is both meritless and unworthy of this Court's time and resources.

B. The Seventh Circuit Also Correctly Found That The Undisputed Evidence Demonstrated That The 12 Associations Proffered By Petitioner Do Not Compete With Associations Of Realtors®.

Even if one were to accept, *arguendo*, petitioner's position that the Seventh Circuit should not have required petitioner to present economic evidence regarding the relevant product market, this conclusion would not alter the Seventh Circuit's ultimate finding – based on an examination of all the evidence that petitioner did present – that petitioner failed to present evidence from which a jury could find the existence of competitors to RASCW or NAR in the tied product market. Petitioner points to no circuit split regarding the manner in which the Seventh Circuit analyzed this evidence. Instead, he appears to be asking this Court simply to correct the Seventh Circuit's alleged mistakes in the application of law to the facts of this case. This Court should decline petitioner's invitation.

As petitioner recognizes in his brief, "'[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" (Pet. 8 (quoting *Brown Shoe*, 370 U.S. at 325). Petitioner argues that he presented evidence of such reasonably interchangeable "substitutes", but that the Seventh Circuit rejected the evidence on the grounds that it was not presented through expert testimony. (*Id.* at 12).

The Seventh Circuit did no such thing. Rather, the court examined each of the 12 associations proffered by petitioner and concluded that, "[e]ven without an economic analysis, it

is apparent that RASCW lacks competition." (Pet. App. 12a). As the court explained, each of petitioner's proffered associations targets a specific subset of real estate professionals – for example, appraisers, independent brokers, or members of certain racial and ethic minority groups. (*Id.* at 12a-12b). Due to these "dissimilar purposes", these "niche associations" offer different kinds of services and are thus "unlikely substitutes for a Realtors Association in Wisconsin." (*Id.* at 13a-14a).

Petitioner argues that the Seventh Circuit improperly focused on "the degree to which the buyer populations of the thirteen firms differed, when it should have focused on the amount of overlap." (Pet. 19). However, this argument misconstrues the Seventh Circuit's analysis. The Seventh Circuit did not find that the proffered associations do not compete with Realtor® associations merely because they have different types of members. Rather, the point is that the differing focus of these associations impacts the types of *services* they provide, thus rendering those specifically-tailored services different from, and inadequate substitutes for, the more general services that Realtor® associations provide.

Petitioner seems to advance the notion that the existence of overlapping customers alone – for example, some appraisers belong to both NAR and the National Association of Real Estate Appraisers – demonstrates that the associations are in the same product market. (*See* Pet. 18). But this notion is meritless. In a given neighborhood, many people may shop at both the local grocery store and the local department store, but no one would suggest that these stores therefore compete in the same product market.

Rather, as petitioner later acknowledges, "[o]verlapping customers does not force a conclusion that the products are in the same market.... '[T]he relevant inquiry remains whether the differences in type render the products poor substitutes.'" (Pet. 18-19) (quoting *Telcor Commc'ns, Inc. v. Southwestern*

Bell Tel. Co., 305 F.3d 1124, 1132 (10th Cir. 2002)). As to this inquiry, petitioner produced no evidence whatsoever that the 12 proffered associations are good substitutes for NAR or RASCW. For example, perhaps most glaringly, he did not present any testimony – lay or expert – that consumers find NAR or RASCW's services to be interchangeable with or good substitutes for the more specialized services provided by the other 12 associations.

Quite to the contrary, petitioner's own testimony dooms his argument with respect to at least one of the associations – the National Association of Exclusive Buyer Agents ("NAEBA"). Petitioner is a member of NAEBA, which serves only exclusive buyer agents. (Pet. 2). At his deposition, petitioner expressly testified that NAEBA offers distinctly different services than NAR:

> Q: Do you see NAEBA membership and Realtor[®] Association membership as being good substitutes for each other in terms of membership in a trade association?
>
> A: I can tell you I've never really thought of it that way. I would say that there are substantive differences between the two organizations for sure and what is offered between the two organizations, so no.
>
> Q: What are those differences?
>
> A: Again, the National Association of Exclusive Buyer Agents only focuses on buyer representation, whereas the National Association of Realtors[®] and the other Realtor[®] organizations have the full gamut of services and things that relate to seller representation, dual agency, transaction brokerage in the states where it applies. So there's just an entirely different universe in that fashion.

(Reifert Dep. at 100-01). Petitioner also testified that he belongs to both NAEBA and NAR because NAEBA provides services not provided by NAR and that he would prefer to belong to NAEBA over NAR even if NAEBA were more expensive. (*Id.* at 100-02). It is ironic that, given his own testimony, petitioner is still trying to advance the notion that NAEBA and NAR are in the same product market because they offer the same services and are good substitutes.

Rather than introduce evidence of interchangeability, petitioner relied exclusively on a chart illustrating that some or all of the associations provide services falling in the following categories – certifications, standards, education, publications, insurance, directories, credit cards, discounts, networking, advocacy, website, conventions, and hotline. (Pet. 5). However, petitioner ignores the crucial question: What *kind* of certifications, standards, education, etc.? Unless these and other services cover substantially similar subject matters, they do not indicate that the associations compete in the same product market as one another. For example, the American Medical Association and the American Bar Association each provide certifications, standards, and education. Yet no one would argue that they are competitors of each other – or of Realtor® associations.

As the district court observed:

> While it is true that there is superficial overlap in the offerings of these associations – conventions, websites, education, publications, lobbying – these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional organizations offer such services while undoubtedly serving different product markets.

(Pet. App. 31a). Petitioner offered no evidence at all concerning the subject matter of the various associations' services – other than the associations' names, of course,

which clearly indicate differing subject matter tailored to specific subsets of real estate professionals.

In a final, inflammatory attack on the Seventh Circuit's reasoning, petitioner argues that the court's finding that associations serving minority communities are not in the same product market as Realtor® associations "makes sense" only if one "read[s] NAR as Caucasian" and "assume[s] NAR does not support minority members in real estate." (Pet. 14, 15; *see also id.* at 30 ("Nine federal judges have now ruled that trade associations of realty agents interested in supporting the interests of Asians, Hispanics, African-Americans, and other minorities, must be excluded as competitors of NAR for skin color reasons.")). But it is petitioner's position, not the Seventh Circuit's, that makes no sense. Under the Seventh Circuit's reasoning, NAR is not seen as Caucasian or not supporting minorities. Rather, it is recognized as serving and supporting *all* races with no particular focus – thus making its services different than those of other associations that tailor their services to the needs and interests of specific minority groups.

Petitioner also strangely asserts that there was "no evidence in the record" to support the Seventh Circuit's conclusion that certain associations "serve[d] a distinct ethnic community." (Pet. 13 (alteration in original); *see also id.* at 14-15). This is wrong. For example, the president of the National Association of Real Estate Brokers (NAREB) testified at his deposition that NAREB focuses on minority real estate agents and on creating home ownership opportunities for Americans of minority race or status. (Branch Dep. at 7). And in his opening brief to the Seventh Circuit, petitioner himself stated that NAREB "was founded on, and has a tradition of, representing minority members active in real estate." (Pl. Br. 21).

With respect to the other associations, petitioner produced scant evidence concerning their operations. However, their names alone demonstrate their focus on specific ethnic

commu[illegible]s: the Asian Real Estate Agent Association, the Chinese American Real Estate Professionals Association, the Chinese Real Estate Association of America, and the National Association of Hispanic Real Estate Professionals. Further, that these associations also allow non-minorities to join (*see* Pet. 14-15) does not change the fact that their services remain tailored to minority communities and thus differ from the more general services offered by associations of Realtors®.

This Court has long recognized that, to be in the same product market, products must be reasonably interchangeable. *See Brown Shoe*, 370 U.S. at 325. The Seventh Circuit did nothing more that apply this concept and find that petitioner had not submitted any evidence from which a jury could find that any of the 12 diverse, specialized associations proffered by petitioner compete in the same product market as the more general Realtor® associations. There is no reason for the Supreme Court to disturb this finding.

C. The Seventh Circuit Did Not Err By Deciding An Issue Of Market Definition On Summary Judgment.

Petitioner next argues that the Seventh Circuit erred because market definition is a question of fact that must always be left to the jury to decide and can never be decided on summary judgment. (Pet. 19). He also claims that the Supreme Court has never decided "whether market definition is for the court or jury" and should address this "important question" of "first impression." (*Id.* at 20). But market definition is no different for these purposes than any other issue. The courts need only apply – as the Seventh Circuit did here (Pet. App. 5a-6a) – the time-tested summary judgment standards articulated in Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and other Supreme Court precedents.

Under Rule 56, the relevant inquiry on summary judgment is whether "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As this Court explained in *Anderson*, a factual issue is "'genuine'" only if a "reasonable jury" could find for the non-moving party. *Anderson*, 477 U.S. at 248. In the case of market definition, the question thus becomes: could a reasonable jury find that the nonmoving party's proposed market definition is correct? This inquiry does not change simply because market definition is considered a question of fact. Rather, summary judgment remains appropriate where a reasonable jury could not find, based on the evidence presented, that the nonmoving party's market definition is correct.

Following these standards, courts have found that market definition issues may be decided on summary judgment where appropriate. For example, in *Colsa Corp. v. Martin Marietta Services, Inc.*, 133 F.3d 853 (11th Cir. 1998), the Eleventh Circuit noted: "we disagree with Colsa's contention that merely because the definition of 'relevant' market' is a factual question, summary judgment is inappropriate. Summary judgment is clearly available even for factual issues." *Id.* at 855 n.4. *See also Metro Indus.*, 82 F.3d at 848 (affirming summary judgment for defendant because there was insufficient evidence concerning the relevant market); *Flegel v. Christian Hosp. Ne.-Nw.*, 4 F.3d 682, 689-91 (8th Cir. 1993) (affirming summary judgment because there was insufficient evidence to support plaintiffs' proposed market definition.); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 481 (3d Cir. 1992) (en banc) (affirming summary judgment because plaintiff's evidence did not support its proposed market definition).

Further, contrary to petitioner's contention, the decisions he cites do not hold that market definition issues must always reach the jury. In *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir. 1996), the

First Circuit considered whether to reverse a jury's verdict, stating: "we must bear in mind that 'market definition is a question of fact' and 'we therefore must affirm the jury's conclusion *unless the record is devoid of evidence upon which the jury might reasonably base its conclusion.*'" *Id.* at 196 (emphasis added). The court also stated: "Although Costal has properly pointed out that the question of market definition is one of fact for the jury, a plaintiff *must present sufficient evidence from which a reasonable jury could find the existence of the proposed relevant market.*" *Id.* at 197 (emphasis added). The court then went on to find – as a matter of law – that the jury's market definition was incorrect and reversed the jury's monopolization verdict. *Id.* at 198-99.

Similarly, in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), the court stated that "[m]arket definition is a question of fact, and we therefore must affirm the jury's conclusion *unless the record is devoid of evidence upon which the jury might reasonably base its conclusion.*" *Id.* at 825 (emphasis added) (citation omitted). And in *Thompson*, the Eleventh Circuit stated that "[t]he parameters of a given market are questions of fact, and therefore summary judgment is inappropriate *if there are material differences of fact.*" *Thompson*, 934 F.2d at 1573 (emphasis added) (citation omitted). Thus, each of these decisions recognizes that, while market definition is considered a question of fact, it can be decided on summary judgment where the plaintiff fails to submit evidence sufficient to support his proposed definition.

In addition to arguing that market definition can never be decided on summary judgment, petitioner also tries to reduce his burden by asserting that he need only make a "'minimal'" or "'modest'" showing regarding the existence of competitors in the tied product market. (Pet. 20). But no court has accepted this proposition, and the cases cited by petitioner provide him no support. In *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803 (1st Cir. 1988), the First Circuit required plaintiff to show that there was some

minimal amount of foreclosure in the tied product market; it did not reduce the plaintiff's burden of proof in so showing. *Id.* at 815 n.11. Moreover, the "modest showing" mentioned in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), applied to a showing of market power in the *tying* product market, not the existence of competitors in the *tied* product market. *Id.* at 841. And *Thompson* made no mention of a lower burden of proof for this element of a tying claim. *See Thompson*, 934 F.2d at 1570-79.

In sum, petitioner failed to produce evidence from which a reasonable jury could find that any of the 12 associations proffered compete in the same product market as RASCW, NAR, or any other association of Realtors®. The Seventh Circuit's finding was not error, and there is no reason for the Supreme Court to grant certiorari.

II. THE SEVENTH CIRCUIT'S ANALYSIS OF ARTICLE 16 OF THE NAR CODE OF ETHICS DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT.

Petitioner also seeks review of the Seventh Circuit's rejection of his theory of liability premised upon Article 16 of NAR's Code of Ethics. He asserts that the decision of the Court of Appeals conflicts with *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). (Pet. 20-22). However, there is no conflict. The Seventh Circuit properly applied the rule of reason in finding that petitioner could not survive summary judgment.[6]

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[6] Review of the Seventh Circuit's decision regarding Article 16 is also inappropriate because it was not even presently properly in the district court. Petitioner's First Amended Complaint did not even mention Article 16, much less allege that it violates the antitrust laws. Petitioner never sought leave to amend his complaint in order to add this theory of liability or to add NAR – which promulgated Article 16 – as a defendant. *See Rosenfeld v. Lion Mfg. Corp*, 253 F.2d 90, 93 (7th Cir. 1958) ("[I]t is axiomatic that plaintiff cannot recover upon a cause of action different from that upon which his complaint is based."); *Bender v. Southland*

To begin, petitioner failed to allege even that he had been harmed by Article 16 in any way. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42 (1990) (a plaintiff must show antitrust injury stemming from the defendant's conduct). Article 16, Standard of Practice 16-2, on which petitioners focuses, prevents a Realtor® from contacting a seller who has a current exclusive listing agreement with another Realtor® and arranging to enter into a new listing agreement to begin when the exclusive agreement ends. NAR, *Code of Ethics and Standards of Practice*, art. 16, 16-2 (Jan. 1, 2007), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2007Code ("NAR Standard of Practice"). However, petitioner represents only buyers and never takes listings from sellers. Thus, this application of Article 16 does not restrain petitioner at all.

Petitioner also argues that Article 16 prevents him from contacting a seller who has a current exclusive listing agreement with another Realtor® to sell one home and arranging to enter into an agreement to represent that seller in the purchase of another home. However, Article 16 does no such thing. NAR Standard of Practice 16-3 expressly states:

> Article 16 does not preclude REALTORS® from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements.

Thus, petitioner is in fact entirely free to approach a seller who is under an exclusive listing agreement to sell one property in order to discuss representing the seller in buying a different property. It is remarkable that petitioner simply

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Corp., 749 F.2d 1205, 1215 (6th Cir. 1984) (refusing to consider theory of antitrust liability that was not pleaded in the complaint).

ignores this provision, despite it having been pointed out to him in the court below.[7]

More fundamentally, even putting aside the fact that Article 16 does not restrain petitioner in particular, Article 16 does not violate the antitrust laws at all. In *Professional Engineers*, the National Society of Professional Engineers prohibited its members from negotiating fees with, or providing any sort of pricing information to, clients prior to their selection for a project. *Professional Eng'rs*, 435 U.S. at 683-85. This Court found the absolute "ban on competitive bidding" unlawful under the rule of reason (not under the *per se* rule, as petitioner suggests). *Id.* at 695.

Despite petitioner's hyperbole and repeated attempts to mischaracterize Article 16, the factual circumstances here are completely different from those in *Professional Engineers*. Article 16 does not place any restrictions on Realtors® in competing for listings when a seller first decides to hire a broker. Article 16 also does not prevent Realtors® from soliciting listings and competing on all terms after an exclusive listing agreement has expired. (NAR Standard of Practice 16-8).

Even during the term of an exclusive listing agreement, Article 16 prevents brokers only from specifically targeting and making the initial contact with a seller who has an

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[7] NAR Standard of Practice 16-3 further states that "information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other Realtors® to whom such offers to provide services may be made." This does not mean that petitioner cannot contact those clients. It means only that he cannot use the MLS as a database of potential clients. Such limitation on the use of MLS information is entirely reasonable, as the MLS does not exist to provide petitioner with leads for obtaining new clients. Instead, an MLS exists in order to help its participants bring buyers and sellers together. This restriction is also procompetitive, for the reasons discussed below. *See infra* p. 23. Petitioner remains free to target clients of other Realtors® as long as he does not use the MLS to identify those clients.

exclusive listing agreement in order to enter into another listing agreement on the same property. As long as the seller makes the initial contact, a broker is entirely free to discuss the terms of an agreement (including price) or to enter into an agreement which will commence when the exclusive listing is expired. (NAR Standard of Practice 16-6). And, as discussed above, brokers may solicit sellers in order to offer other services, such as buyer representation. (*Id.* 16-3). Brokers may also freely engage in general advertising, mailings, telephone canvassing, or other announcements. (*Id.* 16-2).

Given the limited actual scope of Article 16, the following statements in petitioner's brief are simply incorrect:

- "[H]e is forced to agree to NAR rules that prohibit him from contacting property owners who have current listings with other realty agents." (Pet. 2).[8]
- "NAR's non-solicitation rule prohibits Realtor association members from contacting sellers who have listed their properties with other Realtors." (*Id.* at 20).
- "[A] buyer agent would ordinarily want to send buyer-oriented literature to sellers in the MLS as the most efficient use of marketing resources. This is prohibited by NAR rules...." (*Id.* at 27).
- "The Seventh Circuit acknowledged NAR's rule, as imposed by RASCW, prohibits Reifert from contacting sellers to offer buyer-oriented services." (*Id.*).

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[8] In support of his reading of Article 16, petitioner states that, "[i]n deposition testimony, NAR expressly acknowledged that agents such as Reifert were prohibited from contacting sellers, even though no listings contracts would be violated." (Pet. 21). But petitioner conveniently fails to provide any citation to support this assertion, and there is no such citation. Petitioner also makes the false accusation – again without any record support – that "[t]he rules are enforced in secret prosecutorial sessions." (*Id.* at 27). This is simply not true.

Rather, it is only for the duration of the exclusive listing agreement that targeted solicitation of another's listing is banned – and for a procompetitive reason.

As the Seventh Circuit held, Article 16 promotes the effective functioning of SCWMLS because, without such an assurance, Realtors® would be reluctant to submit listings to the MLS, thereby revealing the names and addresses of their clients to competing MLS participants. And, "[i]f agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient. Article 16 aids competition and fulfills the purposes of the Sherman Act by providing a more transparent marketplace." (Pet. App. 18a). Similarly, in granting summary judgment on an antitrust challenge to Article 16 in another lawsuit, the Eastern District of Washington noted that "[c]ourts have consistently regarded the non-solicitation rule as being pro-competitive, providing an inducement for brokers and consumers to participate in the MLS." *Prencipe v. Sopkane Bd. of Realtors*, No. CIV-04-1319-LRS, 2006 WL 1310402, at *3 (E.D. Wash. May 16, 2006).[9]

Indeed, as the Seventh Circuit further noted, the importance of a non-solicitation rule like Article 16 to a well-functioning MLS is demonstrated by the fact that state-wide MLSs in Massachusetts and Alaska (neither of which is affiliated with

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[9] Petitioner asserts that NAR "acknowledged that it had no factual basis whatsoever to justify" the restrictions of Article 16 as procompetitive. (Pet. 21; *see also id.* at 28 ("In record testimony, NAR admitted it was unaware of any harms avoided by the no-contact rule"). But petitioner provides no support for this bald assertion, which is incorrect. In the courts below, petitioner tried to support a similar statement by pointing to the deposition of Cliff Niersbach. However, Mr. Niersbach testified only that he was unaware of any "empirical evidence" regarding whether MLS participants would drop out of an MLS without Article 16. (Niersbach Dep. at 59). Mr. Niersbach further testified that, based on his almost 30 years of working with real estate brokers, he knows that Realtors® find Article 16 to be a valuable assurance protecting the listings that they place on the MLS. (*Id.* at 58).

NAR) similarly require their users to agree not to solicit the exclusive listings of other MLS users during the term of an exclusive listing agreement. (Pet. App. 17a-18a). Petitioner asserts that these rules "were far narrower, allowing more competition by agents, proving MLSs will function with less restrictive rules." (Pet. 22). But once again, he offers no explanation or support for this statement. Rather, deposition testimony from both MLSs reveals that their respective non-solicitation rules prohibit an MLS user from contacting sellers during the term of another MLS user's exclusive listing agreement in order to enter into a new agreement effective upon the expiration of the first one. (*See* Condon Dep. at 10; Freeman-Eaton Dep. at 14, 17).

In light of these considerations, petitioners' suggestion that Article 16 is *per se* illegal must be rejected. "Courts apply per se treatment only after 'considerable experience' with a particular business practice has inevitably resulted in a finding of anticompetitive effects." *United States v. Andreas*, 216 F.3d 645, 666 (7th Cir. 2000). "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999). Moreover, the rule of reason applies where, as here, "horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Board of Regents*, 468 U.S. 85, 100-01 (1984). *See Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374 (W.D. Wis. 1997) ("*[P]er se* illegality is limited to 'naked' restraints on trade and does not cover agreements that facilitate productive activity.... When the cooperative agreement contributes to productivity through integrated efforts, the Rule of Reason is the norm.")

As discussed above, Article 16 has productivity-increasing procompetitive benefits because it encourages participation in the MLS. Although petitioner disputes the value of such

benefits (Pet. 21-22), a challenge to Article 16 must be evaluated under the more searching rule of reason. *See California Dental Ass'n*, 526 U.S. at 778. ("The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA .... The point, rather, is that the plausibility of competing claims about the effects of [the defendant's conduct] rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.").

Under the rule of reason, the initial burden is on petitioner to demonstrate that the challenged conduct has anticompetitive effects in a relevant product market. *See Bi-Rite Oil Co. v. Indiana Farm Bureau Co-op. Ass'n*, 908 F.2d 200, 203 (7th Cir. 1990). Here, petitioner was so convinced that Article 16 is *per se* illegal that he did not produce *any* evidence of anticompetitive effects – for example, evidence of increased commission rates or other harm to consumers due to Article 16. Instead, petitioner relies entirely on his assertion that Article 16 prevents him from contacting certain sellers in order to offer his buyer representation services to them (Pet. 20-22) – a practice which is, in fact, expressly *permitted* under Article 16, and which petitioner fails to show results in any harm to consumers. *See supra* p. 20.

Because petitioner did not meet his burden of demonstrating anticompetitive effects under the rule of reason, the burden never even shifted to respondents to produce evidence of procompetitive effects. *See F.E.L. Publ'ns Ltd. v. Catholic Bishop*, No. 81-1333, 1982 WL 19198, at *8 (7th Cir. Mar. 25, 1982). Thus, petitioner's arguments against the procompetitive effects found by the Seventh Circuit (Pet. 22) are simply besides the point (not to mention incorrect). The burden was on petitioner to produce evidence of anticompetitive effects, and he did not do so. The Seventh Circuit was therefore correct in affirming summary judgment for respondents.

In a last ditch attempt to shore up his request for this Court to review the Seventh Circuit's decision, petitioner tries to somehow connect his complaint with the Department of Justice's currently-pending antitrust lawsuit against the National Association of Realtors® (Pet. 29) and with a report from the Government Accountability Office which allegedly found a lack of price competition between real estate brokers (*id.* at 26, 28). But as petitioner admits, the Department of Justice's lawsuit concerns NAR's rules governing brokers' display of listings on the internet. (*Id.* at 29). It has nothing to do with Article 16 or the Membership Rule challenged by petitioner here. Further, petitioner cites nothing – nor could he – suggesting that the Government Accountability Office's report attributes any of the alleged lack of competition in the real estate industry to the practices at issue in this lawsuit.

With respect to Article 16, petitioner's fundamental error was to assume that the *per se* rule would apply and thus neglect to introduce any actual evidence of anticompetitive effects. But as the Seventh Circuit held, the existence of procompetitive effects makes *per se* analysis inappropriate here. Rather, the rule of reason was the appropriate framework for analyzing Article 16. Petitioner failed to carry his burden under the rule of reason, and summary judgment for respondents was properly granted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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